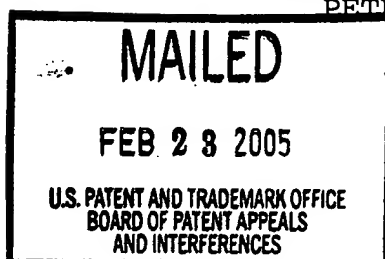


The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte WILHELMUS JOHANNES EVERARDUS VAN DEN DUNGEN and
PETER JOHANNES CHRISTOFFEL MARIA BERGMANS



Appeal No. 2005-0452
Application No. 09/890,486

ON BRIEF

Before PAK, WALTZ, and PAWLIKOWSKI, Administrative Patent Judges.
WALTZ, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on an appeal from the primary examiner's final rejection of claims 47 through 57. The remaining claims pending in this application are claims 31 through 46, which stand withdrawn from consideration by the examiner as directed to a non-elected invention (final Office action dated May 3, 2004, page 2; Answer, page 2, ¶(3)). We have jurisdiction pursuant to 35 U.S.C. § 134.

According to appellants, the invention is directed to a method of manufacturing a co-extruded food product such as

sausage, including a first step of co-extruding a continuous string of the food product with a substantially uniform collagen layer and a final step of separating the food product into separate units which are then subjected to a coagulation treatment (Brief, page 2). Appellants state that the claims do not stand or fall together but requests consideration of two groups (Brief, page 3). Since the groups listed by appellants are the subject of different rejections, we consider one claim from each rejection separately. *See In re McDaniel*, 279 F.3d 1379, 1383, 63 USPQ2d 1462, 1465 (Fed. Cir. 2002).

Representative claims 47, 49 and 57 are reproduced below:

47. A method for manufacturing a co-extruded food product comprising the steps of:

a. co-extruding a continuous string of a food product which is provided all around with a substantially uniform collagen layer;

b. subjecting the collagen layer to a coagulating treatment under the influence of coagulants, whereafter the final co-extruded food product is obtained; and

c. separating the string of food product into separate units before subjecting these to the coagulation treatment.

49. The method as claimed in claim 47, wherein the collagen layer is formed from collagen gel to which dry collagen is added.

57. The method as claimed in claim 49 further comprising the use of dry collagen.

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The examiner has relied upon the following references as evidence of obviousness:

Henderson et al. (Henderson)	3,551,535	Dec. 29, 1970
Kobussen et al. (Kobussen)	6,054,155	Apr. 25, 2000
Morgan et al. (WO '660) (published International Application)	WO 93/12660	Jul. 08, 1993
Van de Dungen et al. (WO '729) (published International Application)	WO 99/13729	Mar. 25, 1999

Claim 57 stands rejected under 35 U.S.C. § 112, second paragraph, as indefinite, and under 35 U.S.C. § 101 "as an improper definition of a process" (Answer, page 4). Claims 47-48 and 52-55 stand rejected under 35 U.S.C. § 103(a) as unpatentable over WO '729 in view of WO '660 (*id.*). Claims 49-51 and 57 stand rejected under 35 U.S.C. § 103(a) as unpatentable over WO '729 in view of WO '660 and Henderson (Answer, page 5). Claim 56 stands rejected under 35 U.S.C. § 103(a) as unpatentable over WO '729 in view of WO '660 and Kobussen (Answer, page 6).

Based on the totality of the record, we reverse the examiner's rejection of claim 57 under section 101 for reasons stated below. We *affirm* the rejection of claim 57 under section 112, ¶2, and also *affirm* all of the rejections under section 103(a) based on prior art, essentially for the reasons stated in

the Answer and those reasons set forth below. Accordingly, the decision of the examiner is *affirmed*.

OPINION

A. *The Rejections under § 112, ¶2, and § 101*

The examiner finds that the use of "dry collagen" as recited in claim 57 on appeal is indefinite under section 112, ¶2, since this claim does not set forth any active, positive steps involved in the method and "dry collagen" is already recited in "parent claim 49" (Answer, page 4). Additionally, the examiner finds that claim 57 "results in a claim which is not a proper process claim" under section 101 since it recites a use without any process steps (*id.*).

Appellants argue that "[d]ependent claim 57 requires, in part, the use of dry collagen with the collagen gel of dependent claim 49 to form the collagen layer of independent claim 47." Brief, page 8 (see also page 9). Accordingly, appellants submit that claim 57 is a proper process claim under sections 101 and 112, ¶2 (Brief, page 9).

The legal standard for definiteness of claim language is whether this language reasonably apprises one of ordinary skill in the art of the scope of the claim. *See In re Warmerdam*,

33 F.3d 1354, 1361, 31 USPQ2d 1754, 1759 (Fed. Cir. 1994). As correctly stated by appellants, claim 57 recites "the use of dry collagen" and depends on claim 49. However, claim 49, which depends on independent claim 47, already recites that the collagen layer of claim 47 "is formed from collagen gel to which *dry collagen* is added" (italics added). We determine that the scope of claim 57 is unclear or uncertain since: (1) the "dry collagen" of claim 57 could be the same "dry collagen" as recited in claim 49 for adding to the collagen gel to ultimately form the collagen layer of claim 47;¹ or (2) the "use of dry collagen" as recited in claim 57 could be another addition of "dry collagen" for this same step of adding to the collagen gel to form the collagen layer; or (3) the "dry collagen" could be added as part of some other step in the process. Accordingly, we determine that one of ordinary skill in this art would not have been reasonably apprised of the scope of claim 57 since at least three claim constructions could arise from the contested language.

Appellants' argument noted above is not well taken since appellants apparently do not recognize that "dry collagen" has

¹If this is the correct interpretation of claim 57, then this claim does not further limit the claim on which it depends (claim 49) in violation of 35 U.S.C. § 112, ¶4.

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already been recited in dependent claim 49 as well as in claim 57 (see the Brief, pages 8-9).

For the foregoing reasons and those stated in the Answer, we determine that the examiner has established that one of ordinary skill in the art would not be reasonably apprised of the scope of the language in claim 57. Accordingly, we affirm the examiner's rejection of claim 57 under 35 U.S.C. § 112, second paragraph.

We cannot sustain the examiner's rejection of claim 57 under section 101. Although the examiner is correct that claim 57 fails to explicitly recite any positive, active process steps, we note that claim 57 is not an independent claim. *Cf., Ex parte Dunki*, 153 USPQ 678, 679 (Bd. App. 1967); and *Ex parte Erlich*, 3 USPQ2d 1011, 1017 (Bd. Pat. App. & Int. 1986). As previously mentioned, claim 57 depends on claim 49 which depends on independent claim 47. We further note that the examiner has not rejected claims 47 and 49 as "improper process" claims under section 101. Therefore it may be presumed that claims 47 and 49 recite positive, active steps which comply with section 101. Since claim 57 depends on claim 49, and ultimately claim 47, we therefore determine that claim 57 recites positive, active steps which comply with section 101, and it would be implicit that the

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"use of dry collagen" is associated with a previously recited step of either claim 49 or claim 47.

For the foregoing reasons, we reverse the examiner's rejection of claim 57 under 35 U.S.C. § 101.

B. The Rejections under § 103(a)

With regard to the rejection of claims 47, 48 and 52-55, the examiner finds that WO '729 teaches a method of making sausages by co-extruding meat and a casing, separating the sausage string into separate units, and then subjecting the individual units to a treatment with liquid smoke, a known coagulant (Answer, page 5). The examiner recognizes that WO '729 fails to teach the composition of the casing, in particular that the casing contains 8-10% collagen (*id.*, referring to claims 47 and 52-54). The examiner also recognizes that WO '729 fails to disclose a pre-coagulation treatment prior to separation of the sausage string (*id.*, referring to claim 48).

The examiner applies WO '660 as evidence that it was well known to make sausage by co-extruding meat and collagen, specifically using 4-10% collagen (Answer, page 5, citing

WO '660, page 3, ll. 3-5, and page 6, l. 4).² The examiner also finds that WO '660 teaches coagulation with liquid smoke prior to separation of the string into individual units (*id.*, citing page 3, l. 12-page 5, l. 14). From these findings, the examiner concludes that it was well known in the art to use collagen as a casing for co-extruded meats, and it would have been obvious to one of ordinary skill in the art to use a well known coagulant such as liquid smoke in a pre-treatment to strengthen the sausage casing to prevent damage during processing (Answer, page 5).

As previously mentioned, appellants requested that the claims be grouped into two groups for consideration, with Group I including claims 47-56 and Group II including claim 57 (Brief, page 3). Accordingly, pursuant to the provisions of 37 CFR § 1.192(c)(7)(2003), we select claim 47 from Group I and decide this ground of rejection on the basis of this claim alone. See also *In re McDaniel, supra*.³ Therefore we need not consider the

²We note that appellants admit that the covering layer for co-extruded food products "normally comprises a collagen gel" (specification, page 1, ll. 19-21). Admitted prior art in appellants' specification may be used in determining the patentability of a claimed invention. See *In re Nomiya*, 509 F.2d 566, 570-71, 184 USPQ 607, 611-12 (CCPA 1975).

³Of course, the Group II claim 57 has been separately considered in the section 112, ¶2, and section 101 rejections
(continued...)

examiner's reliance on WO '660 for teaching a pre-coagulation treatment since this teaching was relied upon to reject claim 48 (Answer, page 5).

Appellants argue that the examiner's rationale fails to identify any teaching, suggestion, or motivation to combine the references as proposed (Brief, page 6). This argument is not well taken for reasons well stated by the examiner (Answer, pages 5 and 8). As found by the examiner, WO '729 discloses steps a, b and c as recited in claim 47 with the exception that collagen is not taught by WO '729 as the casing material (Answer, page 5). WO '729 generically discloses that the continuous string of sausage material is formed by co-extruding the filling into "a skin," with no teaching as to the composition of this "skin" (page 11, l. 35-page 12, l. 2). With regard to claim 47 on appeal, the examiner applies WO '660 as evidence that "collagen was a commonly co-extruded material for sausage casings" (Answer, page 5, citing page 3 of WO '660). Appellants do not specifically contest the examiner's finding that collagen was a well known or common co-extruded material for sausage casings

³(...continued)
discussed above. We also separately consider claims 49 and 56 as representative of the other grounds of rejection under section 103(a).

(see the Brief and Reply Brief in their entirety). To the contrary, as previously mentioned, appellants' specification discloses that the outer covering layer for co-extruded food products "normally comprises a collagen gel" (page 1, ll. 19-21).⁴ Accordingly, we agree with the examiner that sufficient suggestion has been provided by the evidence of record to use collagen as the specific casing or "skin" in the product of WO '729.

Appellants argue that merely subjecting the separate links to a liquid smoke post-extrusion treatment has "little more effect than improving the taste" and fails to achieve the benefits of a pre-treatment, including crosslinking (Brief, page 8). Appellants' argument is not persuasive. Appellants are correct that WO '729 teaches that the separate sausage links are subjected to a "taste-improving environment" of "smoke liquid" (WO '729, page 12, ll. 34-37). However, the examiner has cited WO '660 as evidence that "liquid smoke" was a known coagulation agent which provides cross-linking to the collagen gel (Answer, pages 5 and 7; see WO '660, page 3, ll. 13-21; and page 4, ll.

⁴We also note that Kobussen, of record in the rejection of claim 56, similarly discloses that it was known in this art to use collagen gel as the outer surface material for co-extruded sausage products (col. 1, ll. 9-14).

14-20).⁵ Accordingly, it would have been reasonable for one of ordinary skill in this art to believe that the "smoke liquid" treatment of WO '729 constituted a "coagulating treatment" within the scope of claim 47 on appeal.

Appellants argue that WO '660 "teaches away" from the claimed invention by disclosing that the sausage links undergo a coagulation treatment prior to separation into links (Reply Brief, page 2). Appellants also argue that WO '729 "teaches away" from the invention by providing a coagulation treatment (e.g., to form a collagen "skin") prior to separating the sausage links into separate units (Reply Brief, page 3).⁶ Appellants' arguments are not persuasive. As previously discussed, WO '660 has been applied by the examiner as evidence that collagen was a well known casing or "skin" for co-extruded meat products. The timing of the coagulation treatment in WO '660 was not relied upon by the examiner. The examiner found that WO '729 teaches

⁵On this record, appellants do not dispute the equivalence of "smoke liquid" (WO '729) and "liquid smoke" (WO '660) (see the Brief and Reply Brief in their entirety).

⁶Appellants actually argue that the "'079 reference" teaches away from their invention (Reply Brief, page 3). Since no reference of record has been identified as the "'079 reference," we presume appellants were referring to the WO '729 reference (see page 1 of the Reply Brief).

that the coagulation treatment (using "smoke liquid") should occur after separation of the sausage string into individual units (Answer, page 5; see WO '729, page 12, ll. 3-5 and 34-37). Furthermore, appellants have not shown that the "skin" as used in WO '729 is the result of a coagulation treatment, only that some skins in the prior art may be the result of coagulation. As used in WO '729, the most reasonable meaning of "skin" appears to be a "casing" or outer layer for the co-extruded meat product. Therefore we determine that neither reference "teaches away" from the claimed subject matter. See *In re Gurley*, 27 F.3d 551, 553, 31 USPQ2d 1130, 1131 (Fed. Cir. 1994).

With regard to the rejections under section 103(a) of (1) claims 49-51 and 57 over the references discussed above further in view of Henderson; and (2) claim 56 over the references discussed above in view of Kobussen, we note that appellants do not dispute or contest these rejections (see the Brief and Reply Brief in their entirety). We also note that appellants have grouped the claims of these rejections with the claims of the first ground of rejection (Brief, page 3). Accordingly, we adopt the examiner's findings of fact and conclusions of law with regard to these rejections.

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For the foregoing reasons and those stated in the Answer, we determine that the examiner has established a *prima facie* case of obviousness in view of the reference evidence. Based on the totality of the record, including due consideration of appellants' arguments, we determine that the preponderance of evidence weighs most heavily in favor of obviousness within the meaning of section 103(a). Accordingly, we affirm all of the examiner's rejections based on section 103(a).

C. *Summary*

The rejection of claim 57 under 35 U.S.C. § 112, second paragraph, is affirmed. The rejection of claim 57 under 35 U.S.C. § 101 is reversed.

The rejection of claims 47, 48 and 52-55 under section 103(a) over WO '729 in view of WO '660 is affirmed. The rejection of claims 49-51 and 57 under section 103(a) over WO '729 in view of WO '660 and Henderson is affirmed. The rejection of claim 56 under section 103(a) over WO '729 in view of WO '660 and Kobussen is affirmed.

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No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a)(1)(iv) (effective Sep. 13, 2004; 69 Fed. Reg. 49960 (Aug. 12, 2004); 1286 Off. Gaz. Pat. Office 21 (Sep. 7, 2004)).

AFFIRMED


CHUNG K. PAK
Administrative Patent Judge

THOMAS A. WALTZ
Administrative Patent Judge

BOARD OF PATENT
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BEVERLY A. PAWLIKOWSKI
Administrative Patent Judge

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